

Supreme Court, U. S.

FILED

NOV 9 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

vs.

SYLVIA L. MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS, SIXTH CIRCUIT.

**BRIEF OF AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC., AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER.**

FRED E. INBAU, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
FRANK G. CARRINGTON, JR., ESQ.,
JAMES P. MANAK, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 207,
501 Grandview Drive,
So. San Francisco, Ca. 94080,
Counsel for Amicus Curiae.

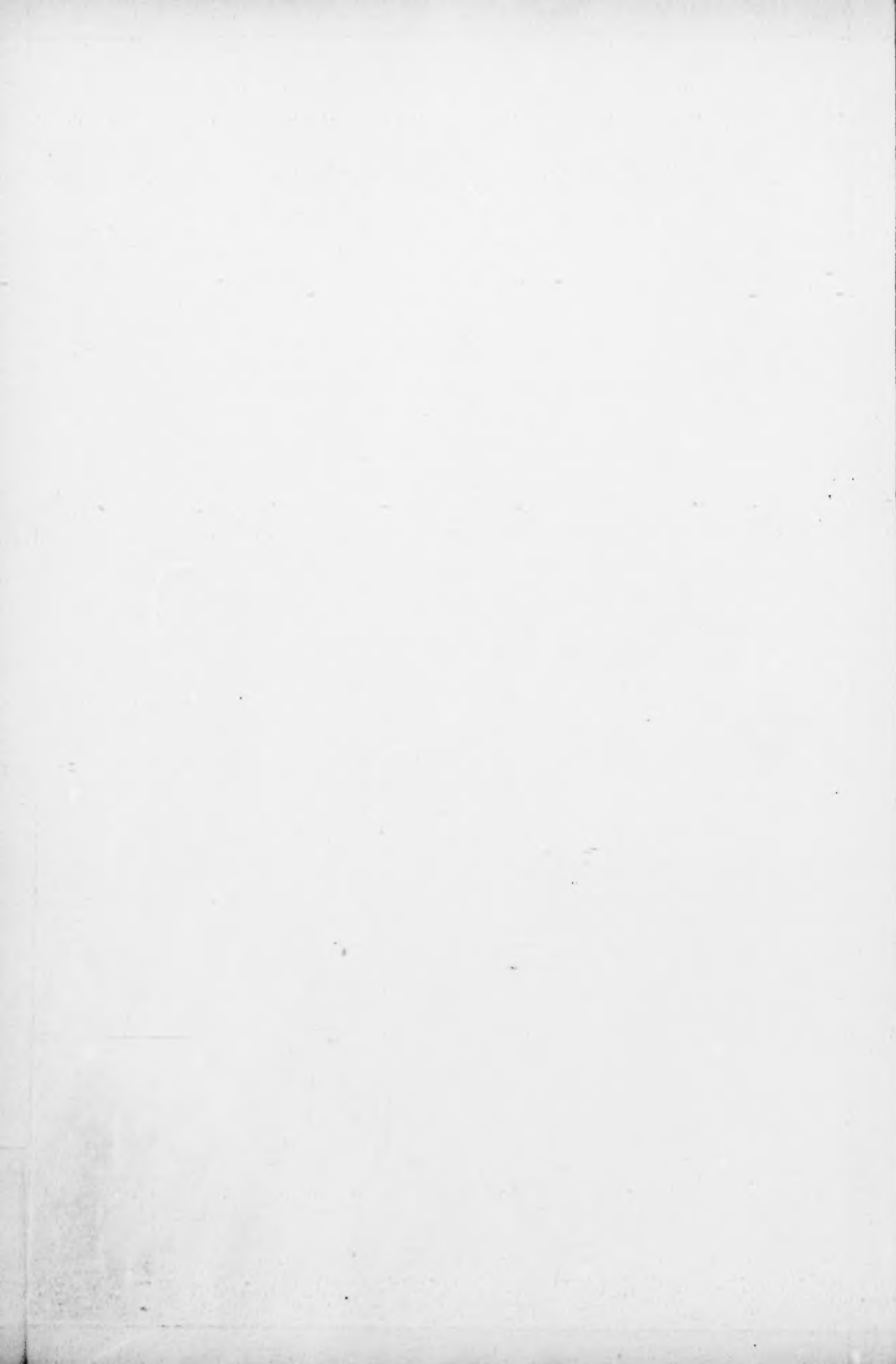


TABLE OF CONTENTS.

	PAGE
Table of Authorities.....	ii
Interest of Amicus Curiae.....	1
Argument	2
I. Introduction	2
II. The Ruling Below Is in Error as It Pertains to the Use of the Drug Courier Profile to Establish Reasonable Suspicion or Probable Cause, and It Seriously Threatens the Use of Profiles in the Hijacker Detection System So Vital to Public Protection	7
III. The Ruling Below Will Also Threaten the Use of Composite Sketches to Establish Reasonable Suspicion or Probable Cause.....	9
Conclusion	11

TABLE OF AUTHORITIES.

Cases.

Commonwealth v. McKenna, 244 N. E. 2d 560 (Mass. 1969)	6
People v. Griffin, 272 N. E. 2d 477 (N. Y. 1971)	6
Reid v. Georgia, No. 79-448 (Ga. Ct. App. 4-4-79), 26 Cr L 4055	3, 4
State v. Ginardi, 268 A. 2d 534 (N. J. App. 1970)	6, 10
Terry v. Ohio, 392 U. S. 1 (1968)	4, 5, 7, 8
United States v. Ballard, 573 F. 2d 913 (5th Cir. 1978) ..	4, 5
United States v. Carrizosa-Gaxiola, 523 F. 2d 239 (9th Cir. 1975)	8
United States v. Davis, 482 F. 2d 893 (9th Cir. 1973) ...	5
United States v. Elmore, 595 F. 2d 1036 (5th Cir. 1979) ..	4, 5
United States v. Epperson, 454 F. 2d 769 (4th Cir. 1972)	5
United States v. Lopez, 328 F. Supp. 1077 (N. Y. 1971) ..	5
United States v. McCaleb, 552 F. 2d 717 (6th Cir. 1977)	3, 4, 5, 7
United States v. Mendenhall, 596 F. 2d 706 (6th Cir. 1979)	3, 4, 5, 7, 10
United States v. Ruiz-Estrella, 481 F. 2d 723 (2nd Cir. 1973)	5

Statutes or Regulations.

37 Fed. Reg. 2500, <i>et seq.</i>	5
---	---

Books.

LaFave, 3 Search and Seizure 332 (1978).....	5
Wall, Eye Witness Identification in Criminal Cases 169-170 (1965).....	9

Articles.

14 ALR Fed. 286, Anti-Hijack Measures-Validity.....	5
42 ALR 3d 1217, Admissibility—Composite Police Sketch	6
20 Am Jur Proof of Facts 539, Eye-Witness Identification	10



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979.

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

vs.

SYLVIA L. MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS, SIXTH CIRCUIT.

**BRIEF OF AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC., AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER.**

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Kenneth Sasse, Esq., and F. Randall Karfonta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests of law enforcement agencies in the investigation and prosecution not only of drug traffickers, but of those who pose a threat to the safety of air travelers and also criminal suspects in general who can be identified and apprehended by use of specific suspect profiles and composite sketches. It is our belief that a failure of the Court to reverse the ruling of the Sixth Circuit Court of Appeals will threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case.

ARGUMENT.

I.

Introduction.

This case directly involves three issues that are of grave importance to state and federal law enforcement officers: (1) the propriety under Fourth Amendment principles of the practice of approaching persons and requesting identification on the basis of facts that, in the experience of such officers, as manifested

in a typical suspect "profile", indicate that such persons may be narcotics couriers, but which are also consistent with innocent behavior; (2) whether the actions of the federal narcotics agents in the instant case, in requesting a suspected narcotics courier to move from the public area of an airline terminal to a nearby office for further questioning, resulted in an arrest for Fourth Amendment purposes that would be unconstitutional unless supported by probable cause; and (3) whether a suspect who is illegally detained can validly consent to a search.

We will limit our consideration in this brief to the first issue and to the related questions that can reasonably be expected as progeny of the ruling of the Sixth Circuit Court of Appeals if upheld by this Court. The importance of this particular issue is underscored by the state case of *Reid v. Georgia*, No. 79-448 (Ga. Ct. App. 4-4-79) presently before the Court on a petition for certiorari filed 9-17-79 (26 Cr L 4055) presenting the question: "Does establishment of drug courier profile by law enforcement personnel create 'articulable suspicion' on which law enforcement personnel may intrude upon freedom protected by Fourth Amendment?"

As is our custom when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, as already stated, address ourselves to the important policy questions raised by the first issue in this case, and to their importance to the effectiveness of law enforcement nationwide.

The keystone case on the present issue in the Sixth Circuit Court of Appeals is *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977) in which the court held that the drug courier profile by itself, does not provide probable cause to arrest a suspect. As noted in the dissenting opinion of Circuit Judge Weick in the instant case (596 F. 2d 706, 708), the question not only of probable cause, but perhaps even more importantly that of

reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry v. Ohio*, 392 U. S. 1 (1968), is one of exceptional importance to the federal Government in view of the large quantities of narcotics flowing into airports such as Detroit from other cities around the country. Footnote one in Judge Weick's opinion (596 F. 2d 706, 708) indicates the type and amount of illegal narcotics seized at the Detroit Metropolitan Airport alone. That situation is repeated at many airports around the country as indicated by cases such as *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978) and *United States v. Elmore*, 595 F. 2d 1036 (5th Cir. 1979), which also involved the use of drug courier profiles by federal narcotics agents. The state case of *Reid v. Georgia, supra*, recently docketed in this Court, indicates that the technique and its legal implications are of importance to state law enforcement personnel as well.

The basic characteristics and operation of the drug courier profile are described in varying degrees of detail in the dissenting opinion in *Mendenhall* in the Sixth Circuit Court of Appeals, and the opinions in *McCaleb*, *Ballard* and *Elmore*, and will not be further described here except to note that the typical characteristics of suspects in such profiles are complex and multitudinous, sometimes involving "primary characteristics" and "secondary characteristics" as described in footnote 3 to the opinion in *Elmore, supra* (595 F. 2d 1036, 1039). As can readily be seen, deliberate application of such complex class characteristics requires the skill and concentration of a trained law enforcement officer, and by no means can it be said that such an officer, if properly applying the profile to a given suspect, is acting on a mere "hunch" or "guess". Indeed, such proper application must be conceded to involve the kind of "articulable suspicion" referred to in *Reid v. Georgia, supra*, and approved as the basis for the exercise of the Fourth Amendment stop and frisk power of law enforcement officers articulated first in *Terry v. Ohio, supra*. It is important to note that con-

struction of the profile is based not upon someone's imagination of what drug couriers must look like and their characteristics, but upon what drug couriers *in fact* look like and their *actual* characteristics, as revealed by the real-life experience of trained law enforcement officers, accumulated over a period of time and memorialized in the drug courier profile. See, *Mendenhall, McCaleb, Ballard and Elmore, supra*.

The use of the drug courier profile is analogous to two other important law enforcement activities that *amicus* wishes to bring to the attention of the Court. The first is the profile that has become a standard part of the total antihijacking procedures implemented by industry and the federal Government to stem the tide of aircraft hijacking and pirating that has resulted in the great loss of lives and destruction of property. See, 37 Fed. Reg. 2500, *et seq.* These procedures involve, in progression: (1) a "profile" that consists of observable characteristics which, based upon the experience of law enforcement officers, distinguishes potential hijackers from the public in general—not unlike the nature and use of the drug courier profile involved in the instant case; (2) electronic weapons detectors (magnetometers); (3) interviews by airline employees or law enforcement officers, similar to the interviews conducted by law enforcement personnel after the drug courier profile has triggered an investigatory stop; or (4) frisks or searches of passengers and/or baggage. See, *LaFave*, 3 Search and Seizure 332 (1978); 14 ALR Fed. 286, Anti-Hijack Measures—Validity.

In the cases that have examined the constitutionality of such procedures, beginning with the use of the profile and a progression to the magnetometer, interview, and weapons frisk, the courts have upheld such techniques generally upon the basis of the Fourth Amendment stop and frisk powers articulated in *Terry v. Ohio, supra*. See, *e.g.*, *United States v. Lopez*, 328 F. Supp. 1077 (N. Y. 1971); *United States v. Ruiz-Estrella*, 481 F. 2d 723 (2nd Cir. 1973); *United States v. Epperson*, 454 F. 2d 769 (4th Cir. 1972); and also, *United States v. Davis*,

482 F. 2d 893 (9th Cir. 1973) (validating such procedures upon authority upholding administrative searches pursuant to a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation). In these cases the courts have focused upon the governmental interest justifying the intrusion, concluding that the extreme danger of a hijack or destruction of property constitutes an "exigent" circumstance justifying an exception to the general warrant requirement.

The second analogous law enforcement activity is the use of composite drawings or sketches to identify and apprehend an unknown suspect in the commission of a crime. The majority of the cases that have discussed such composite drawings have involved the issue of admissibility of the drawings at trial. Such evidence has usually been excluded as hearsay. See, cases collected at 42 ALR 3d 1217, Admissibility—Composite Police Sketch. However, even though such evidence has generally been denied admissibility at trial, it has been recognized as having validity in the formation of *reasonable suspicion or probable cause* for Fourth Amendment arrest purposes. See, *People v. Griffin*, 272 N. E. 2d 477 (N. Y. 1971); *State v. Ginardi*, 268 A. 2d 534 (N. J. App. 1970) (where a composite was compiled by a standard police device known as an "Identi-Kit" consisting of hundreds of transparent celluloid overlays representing variations of human physiognomy); and *Commonwealth v. McKenna*, 244 N. E. 2d 560 (Mass. 1969). Thus, although the courts are split on the issue of the admissibility of such evidence at trial, usually excluding it on the basis of the hearsay rule, it has been recognized as valid and reliable for Fourth Amendment purposes.

Amicus submits, as demonstrated, *infra*, that both of the foregoing accepted and perfectly proper law enforcement investigative techniques—so absolutely necessary—are threatened by the ruling of the Sixth Circuit Court of Appeals with respect to the use of the drug courier profile for investigatory stops founded on reasonable suspicion or even probable cause to arrest.

II.

The Ruling Below Is in Error as It Pertains to the Use of the Drug Courier Profile to Establish Reasonable Suspicion or Probable Cause, and It Seriously Threatens the Use of Profiles in the Hijacker Detection System So Vital to Public Protection.

The Sixth Circuit Court of Appeals in its *en banc per curiam* opinion reversed the judgment of conviction of the District Court without stating that the District Court's finding of facts on the issue of reasonable grounds to stop and question using the drug courier profile had not been supported by substantial evidence. We submit that this was clearly erroneous, and that the conclusion of law relied upon was incorrect. The court apparently regards *McCaleb* as holding that under no circumstances can the drug courier profile be used to find articulable facts sufficient to give rise to a reasonable suspicion that would permit a *Terry*-type stop and questioning. *McCaleb*, however, does not require such a conclusion. The *McCaleb* opinion states that by itself the drug courier profile does not provide probable cause to arrest an individual. It also states, however, that

In addition, while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the intrusion of an investigatory stop. 552 F. 2d 717, 720 (emphasis added).

The *McCaleb* opinion further stated that the activities of the appellants, in that case as observed by the federal agents, were consistent with innocent behavior.

Can it be realistically said, that the confluence of a large number of drug courier profile characteristics, based upon the experience of trained officers in dozens of cases, based upon

actual cases resulting in convictions, and coming together in one suspect at the same time and place, is "consistent with innocent behavior", such that a *per se* rule is justified for excluding the profile as the basis for reasonable suspicion or probable cause?

It is submitted that the presence of a substantial number of the profile characteristics in one suspect, such as the use of small denomination bills for ticket purchases, travel to and from major drug import centers, staying for short periods of time, the absence of luggage or use of empty suitcases, nervousness, use of an alias, etc., taken together, would lead any reasonable person having special knowledge of the *modus operandi* and characteristics of interstate drug couriers to believe that such a person is a drug courier and *requires* a prudent law enforcement officer to stop and inquire of such person. As the Court in *United States v. Carrizosa-Gaxiola*, 523 F.2d 239, 241 (9th Cir. 1975) stated, "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." Reasonable men would agree that even though any one, or a few, of these facts and characteristics taken together might be consistent with innocent behavior, the combination of several simply would not be consistent with innocent behavior.

Certainly the courts referred to in Point I, *supra*, that have considered the use of a hijacker profile in finding a sufficient Fourth Amendment basis to stop and inquire, would not have agreed with the rationale of the Sixth Circuit Court of Appeals in refusing to assign a common-sense value to the use of profiles in the reasonable suspicion-probable cause equation. Although in such cases the profile is considered *in combination* with another element of an investigatory nature, namely the activation of a magnetometer, before an inquiry is made, the profile is an essential element of reasonable suspicion sufficient to undertake the sort of limited intrusion into a suspect's privacy sanctioned by *Terry*. Failure to accord approved legal

status to the use of properly constructed and properly administered suspect profiles in drug courier cases will jeopardize the use of similar profiles in hijacker cases and will seriously disrupt the nation's air safety program.

III.

The Ruling Below Will Also Threaten the Use of Composite Sketches to Establish Reasonable Suspicion or Probable Cause.

As noted, *supra*, many courts have recognized the value of composite sketches in the investigation of crime and the apprehension of suspects, regardless of the inadmissibility of such materials at trial under the hearsay rule. One respected commentator noted the effectiveness and utility of such sketches thusly:

The policeman, by means of skillful questioning, and by trial and error, is able to produce a detailed drawing which the witness states is an accurate representation of the face of the perpetrator of the crime. This drawing is then reproduced in large numbers and given to police officers so as to enable them to recognize the suspect, should they happen to see him. Sometimes, where the crime is a very serious one, copies of the drawing are given to the newspapers, which publish them in an effort to alert the public. Often, criminals who might otherwise have gone free are recognized and arrested because of these drawings. Wall, *Eye Witness Identification in Criminal Cases* 169-170 (1965).

One of the most commonly used systems of composite sketches is the so-called "Identi-Kit". It consists of hundreds of celluloid overlays conforming to typical human features such as hairline, nose, eyes, chin contour, mouth, etc. A composite is usually put together by a trained law enforcement officer and it is then frequently circulated to law enforcement personnel in the field who will attempt to compare the composite sketch to persons they observe. If a specific comparison is made, and a

trained law enforcement officer reasonably believes that a person matches the composite, reasonable suspicion to stop and inquire, or even probable cause to arrest, may exist.

In *State v. Ginardi*, 268 A. 2d 534 (N. J. App. 1970) an "Identi-Kit" was used to prepare a composite sketch of a suspect and the defendant's arrest was made on the basis of a "striking likeness" of the defendant to the drawing, without any other suspicious circumstances being present. The Court stated:

It is clear from the record that the Hamilton police had probable cause to believe that defendant was the man who had attacked Elaine and Susan and were justified in arresting and detaining him. 273 A. 2d 534, 541-542.

Amicus respectfully re-submits that a legitimate law enforcement investigatory tool is threatened by the ruling of the Sixth Circuit Court of Appeals in this case. The similarities between the use of profiles and composite sketches—the attempt to isolate and identify suspects by the use of common characteristics—require a holding by this Court that if the latter may be used for Fourth Amendment purposes, so may the former. Indeed many police departments have carried the use of composite sketches produced by the "Identi-Kit" method one step further by coupling the Kit with *modus operandi* files in a system called "IDMO" to produce mug shots of potential suspects. See 20 Am Jur Proof of Facts 539, Eye-Witness Identification, Section 13. All such legitimate investigatory techniques are threatened by the holding of the court below. Law enforcement agencies, state and federal, will not be able to identify and apprehend suspects in thousands of cases where investigatory stops founded on reasonable suspicion, and arrests founded on probable cause are presently recognized by the courts. *Amicus* submits that the Fourth Amendment does not require so devastating a result.

CONCLUSION.

The decision of the Sixth Circuit Court of Appeals in this case should be reversed as it pertains to the issue of the use of the drug courier profile as a basis for reasonable suspicion and probable cause, because it is unwarranted under any reasonable application of Fourth Amendment principles.

Respectfully submitted,

FRED E. INBAU, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
FRANK G. CARRINGTON, JR., ESQ.,
JAMES P. MANAK, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 207,
501 Grandview Drive,
So. San Francisco, Ca. 94080,
Counsel for Amicus Curiae.